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No. _____

In The

Supreme Court of the United States

October Term, 1988

MERLE LEE MATLOCK,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process and equal protection of the law when he was convicted of violating penal provisions of the Texas Blue Sky law for conduct relating to transactions between joint venturers when that act has been held not to apply to transactions between joint venturers.

2. Whether the Petitioner was denied due process of law when he was convicted for a criminal offense when there was no evidence educed on one critical element of the offense.

3. Whether appellate court's holding that hearsay documents were properly admitted over objection denied Petitioner his constitutional rights to confrontation, cross-examination, due process and equal protection of the laws where:

a. the factual recitations which formed the foundation of the court's holding are not supported in the appellate record;

b. the exhibits at issue were, under the circumstances presented in this trial, totally devoid of any indicia of reliability; and

c. the opinion of the court of appeals is in direct conflict with the relevant statute and prior interpretative case law.

4. Whether the Petitioner was denied due process of law and the right to be free from self incrimination when the prosecutor was permitted to cross-examine the Petitioner regarding his refusal to comply with a grand jury subpoena.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Merle Lee Matlock, and the State of Texas, represented at trial and on appeal by the Hon. John Vance, Criminal District Attorney for Dallas County, Texas.

The respondent before this Court is the Hon. Jim Mattox, Attorney General of Texas.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner, Merle Lee Matlock, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the Court of Appeals for the Fifth Supreme Judicial District of Texas entered in this proceeding on the 31st day of December, 1986, and the 5th day of March, 1987.

OPINION BELOW

The opinions of the Court of Appeals, not yet reported, appears in Appendices A and B hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas reversing the Petitioner's conviction and ordering a judgment of acquittal was entered on July 10, 1987. On December 31, 1986, the initial opinion was withdrawn on rehearing and the conviction was affirmed in a second unpublished opinion. A timely motion for rehearing was filed on January 15, 1987. This motion was denied and a third opinion was delivered addressing some of the issues raised in the Petitioner's motion for rehearing on March 5, 1987. A second motion for rehearing was timely filed on March 20, 1987, and was denied by that court on April 1, 1987. Thereafter, a timely Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals on May 1, 1987. This petition was denied without opinion on May 5, 1988. On June 8, 1988, a motion for rehearing from denial of discretionary review was filed with the Texas Court of Criminal Appeals. This motion was denied on June 29, 1988, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The constitutional and statutory provisions and rules of court involved in the opinions below and in this petition for certiorari appear in Appendix G hereto.

STATEMENT OF THE CASE

The Petitioner was charged in a six count indictment with violations of the Texas Securities Act, commonly known as the Blue Sky Law. See: TEX. REV. CIV. STAT. ANN. art. 581-1 et seq. (1979). A seven week trial ensued, at the conclusion of which the Petitioner was found guilty of the allegations contained in the sixth and final count in the indictment. That count alleged that the Petitioner fraudulently sold certain interests in oil and gas wells and leases with the alleged fraud being the failure to disclose certain material facts to the purchaser. (R.-12-13).

The trial transcript exceeds 4,000 pages in length. The exhibits would fill several large file cabinets. As much of the testimony and exhibits were addressed to Counts One through Five, a traditional recitation of all of the evidence educed at trial would be an unnecessary labor. The Petitioner will, therefore, include in the instant Statement of the Case those facts relevant to the issues to be raised in connection with Count Six.

The testimony at trial showed that the Petitioner formed a corporation called Petrowest Investments. (S/F XII-2695). Several other corporations were also created to conduct oil and gas exploration and development. In

addition, numerous limited partnerships and joint ventures were offered to select investors.

Dale Rindlesbacher, the complainant in Count Six of the indictment, testified that he met with the Petitioner in Dallas in April, 1981. The purpose of this meeting was to discuss the formation of a limited partnership to invest in oil and gas investments. (S/F X-2258 et seq.). Initially it was decided that Rindlesbacher would raise capital through a limited partnership which he was to form. He would, in turn, invest the capital thus raised in a new limited partnership which was to be formed and to be called Enersearch West 1981. (S/F X-2269).

A prospectus was prepared, DR-2, and the complainant proceeded to attempt to raise the necessary capital to establish the proposed limited partnership. (S/F X-2265, 2268-2269). This prospectus stated that ten units, representing one million dollars, needed to be raised and tendered to Petrowest prior to December 31, 1981, in order to initiate and commence the partnership operation. (S/F X-2270). At the same time, a separate Utah corporation was created which was called Bach Investments. Bach Investments was to collect the potential investor's funds until sufficient capitalization was achieved to establish Enersearch West 1981. (S/F X-2267).

When the complainant was unable to raise sufficient capital, he decided to use the capital which he had been able to raise to join with another limited partnership, Western Reserves 1981-III, which was then in the process of being formed, thereby creating a joint venture. (S/F X-2294-2296). On December 22, 1981, the complainant

signed a joint venture agreement and tendered a check to Petrowest. (S/F X-2307).

The Petitioner was subsequently convicted of fraudulently selling and offering to sell fractional undivided interests in specified oil and gas wells and leases. The alleged fraud was the failure to disclose that funds invested by other investors in six unrelated limited partnerships that had been formed by the Appellant had been allegedly commingled and, thereafter, used to pay quarterly distributions to investors in three different limited partnerships. The indictment alleged that this commingling and subsequent payment was a material fact.

The Petitioner testified at trial that the limited partner ship funds were properly disbursed according to the contractual agreements then in force. (S/F XIV-3217-3219). Furthermore, the Petitioner testified that he and Rindlesbacher had simply formed a joint venture and that no security interest in the specified oil and gas leases and wells had been conveyed to Rindlesbacher. (S/F XIII-2966-2967).

REASONS FOR GRANTING THE WRIT

I.

Whether the Petitioner was denied due process and equal protection of the law when he was convicted of violating penal provisions of the Texas Blue Sky law for conduct relating to transactions between joint venturers when that act has been held not to apply to transactions between joint venturers.

At trial, the State introduced testimony by the complainant that the parties to the agreement at issue entered into a joint venture. (S/F X-2410). Likewise, the Petitioner

testified that a joint venture had been formed whereby "we both contributed property for further development" by the venture. (S/F XIV-3145, 3150). The joint venture agreement, offered as an exhibit at trial by the State, expressly stated the following:

> The venturers voluntarily associate themselves together in the Joint Venture for the purpose of engaging in (i) the drilling . . . and operation of oil and gas wells . . .
> (Article 1.02 (a) of Agreement)
>
> * * *
>
> The overall management and control of the business and affairs of the Joint Venture shall be vested in the Venturers *collectively* . . . (emphasis added)
> (Article 2.01 (a) of the Agreement)

It should be noted that under Texas law, when the State offers exculpatory evidence, they are bound by that evidence. *Daniel v. State,* 668 S.W.2d 390 (Tex. Crim. App. 1984); *Bonner v. State,* 426 S.W.2d 869 (Tex. Crim. App. 1968). The State, thus, was estopped from contending that the agreement was not in fact a joint venture.

In addition, Texas case law establishes that to constitute a joint venture "there must be community of interest and participation in the profits. It is the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit." *Brown v. Cole,* 291 S.W.2d 704 (Tex. 1956); *Russell v. French & Associates, Inc.,* 709 S.W.2d 312 (Tex. App. – Texarkana, 1986, writ ref'd n.r.e.); *Mummert v. Stekoll Drilling Co.,* 352 S.W.2d 526 (Tex. App. – Dallas, 1961, writ ref'd n.r.e.); *McConathy v. Dal Mac Commercial Real Estate, Inc.,* 545 S.W.2d 871 (Tex. App. – Dallas, 1976, no writ). The undisputed testimony,

offered by the State, clearly establishes that the parties hereto were entering into a joint venture and the agreement at issue was a joint venture agreement.

In its opinion on rehearing, the Dallas Court of Appeals opined that the agreement herein was not in fact a joint venture. This conclusion is at odds with both the controlling case law and the facts educed at trial herein. The Court failed to apply any of the controlling authority concerning how a joint venture is created, nor did it address the rule that the State was bound by its own evidence that the agreement at issue was a joint venture. Compare: *Russell v. French & Associates, Inc.*, 709 S.W.2d 312 (Tex. App. – Texarkana, 1986, writ ref'd n.r.e.) (identical oil and gas agreement held to be joint venture and outside the scope of the Blue Sky law). Further, the Court, in its second opinion on rehearing, has tacitly recognized that the agreement was a joint venture agreement when it characterized the schedule of oil and gas leases at issue were "included in the *joint venture agreements*". (emphasis added) (B-12). Additionally, the Court delares at one point that "two joint venture agreements were executed" between the Petitioner and the complainant. (B-12).

What makes this determination important is that the Texas courts have uniformly held that the penal provisions of the Texas Blue Sky law, TEX. REV. CIV. STAT. ANN. art. 581-29 et seq. (1973), do not apply to transactions between joint venturers. *Brown v. Cole*, supra; *Russell v. French & Associates, Inc.*, supra; *Vick v. Georgia*, 671 S.W.2d 541 (Tex. App. – San Antonio, 1983) reversed on other grounds, 686 S.W.2d 99 (Tex. 1984); *Wilson v. Lee*, 601 S.W.2d 483 (Tex. App. – Dallas, 1980, no writ). The Dallas Court recognized that a joint venture agreement

was created, but refused to apply the rule of law which holds that the Texas Blue Sky law has no application to subsequent agreements between joint venturers. Other Texas courts, and other panels of the same lower court, when faced with substantially identical conduct, have uniformly held that the penal provisions of the Texas Blue Sky law were inapplicable.

While the Dallas Court goes to great lengths to decide whether some of the documents executed between the parties could be defined as securities, it ignores the rule of law that the Texas Blue Sky law is totally inapplicable to *all* transactions between joint venturers, regardless of whether those documents would otherwise be considered "securities". Under Texas law, all transactions between joint venturers, regardless of their nature, are exempt from the application of the Texas Blue Sky law.

The Texas Court of Criminal Appeals has failed and refused to reconcile this aberration and has permitted the Petitioner to be convicted for conduct which is not the subject of the penal provisions at issue; he was, thus, convicted for conduct which was not a crime in Texas. Accordingly, the Petitioner was denied both due process of the law and equal protection of the law.

II.

Whether the Petitioner was denied due process of law when he was convicted for a criminal offense when there was no evidence educed on one critical element of the offense.

The Petitioner was accused of failing to disclose that he commingled certain funds, this failure constituting a

failure to disclose a material fact. See Appendix H hereto. As this allegation was descriptive of a fact essential to charge a crime, under Texas law the State had the burden of proving this fact beyond a reasonable doubt. *Franklin v. State*, 659 S.W.2d 831, 834 (Tex. Crim. App. 1983); *Wray v. State*, 711 S.W.2d 631, 633-634 (Tex. Crim. App. 1986).

On appeal, the Petitioner challenged the sufficiency of the evidence educed at trial to support the verdict as to commingling. In responding to this allegation, the Dallas Court of Appeals reviewed the evidence as follows:

> Ed Stauffer testified that he invested in Energy Associates 79 and in Enersearch West Limited. As part of a distribution for Energy Associates 79 Partnership, he received a check for $2,606.00 written on or about March 6, 1981. Stauffer identified this check from the check register of Energy Associates 79 Partnership which was admitted into evidence, and identified other transfers between various bank accounts relating to count six in the indictment. Stauffer also testified that funds from trustee accounts, identified as accounts relating to the Western Reserve Limited Partnerships, were transferred into the Explorer Energy Account in the National Bank of Commerce. Stauffer testified further that on or about March 6, 1981, six partnerships deposited funds into the Explorer account, and that a portion of those funds was used to pay distributions to three limited partnerships, Western Pay Zones, Energy Associates 1979, and Enersearch Limited 79-B. Consequently, sufficient evidence exists to show that the funds were commingled into the account of Explorer Energy. (Appendix A-8-9).

What the Court fails to mention is that the funds were deposited into the account of Explorer Energy pursuant to existing and binding turnkey drilling contracts

between the limited partnerships and Explorer Energy for drilling a completion of named wells. (S/F IV-960-961).

The record establishes that the funds which were transferred to Explorer Energy on March 6, 1981, were in fact the monies owed to Explorer Energy since December 31, 1980, under various turnkey drilling contracts. The named limited partnerships had a debt to Explorer Energy and they paid it. Upon payment of the debt, the partnerships had no further right, title or interest in the monies at issue. The funds belonged to Explorer Energy and Explorer Energy deposited the money to its accounts.

The State's own evidence, the various offering documents for each of the aforementioned limited partnerships and their related business plans, established that it was intended from the beginning that the funds at issue would be paid from the partnerships to Explorer Energy prior to the end of the year so that the investors could take a tax deduction for the amounts of the turnkey drilling contracts in the same year as their investment. All of the testimony showed that this proposed plan was in fact carried out as anticipated.

While there was evidence that the monies were deposited into the account of Explorer Energy, there was *no* evidence that *any* funds were *commingled* because the monies at issue belonged solely to Explorer Energy. The State failed to educe any evidence to show that the partnership monies deposited to Explorer Energy's accounts on March 6 still belonged to the partnerships. To the contrary, all of the testimony clearly established that as of December of the previous year, the money at issue was

the sole property of Explorer Energy. The State failed to educe evidence on an element of its case.

A conviction for a criminal offense where the State fails to educe some evidence on each element of its case is constitutionally infirm and cannot stand since it violates fundamental concepts of due process. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

III.

Whether appellate court's holding that hearsay documents were properly admitted over objection denied Petitioner his constitutional rights to confrontation, cross-examination, due process and equal protection of the laws where:

a. the factual recitations which formed the foundation of the court's holding are not supported in the appellate record;

b. the exhibits at issue were, under the circumstances presented in this trial, totally devoid of any indicia of reliability; and

c. the opinion of the court of appeals is in direct conflict with the relevant statute and prior interpretative case law.

David Sullivan, an accountant for Petrowest, testified that certain accounting records were kept by the corporation. (S/F II-430). When Petrowest declared bankruptcy, a bankruptcy trustee took possession of the records. (S/F II-441). Such records included check registers, canceled checks and worksheets. (S/F II-441). At trial those documents were contained in two boxes. (S/F II-444, 470).

Phil Palmer, an attorney for the trustee, testified that, pursuant to a subpoena, he had brought the foregoing

records to the court. (S/F II-470). (A complete list of the records involved are found at S/F II-471-472). The attorney testified that the records had been in his custody since July, 1982. (S/F II-472). The attorney admitted, however, that he could not identify any of the exhibits. (S/F II-472). Over the Petitioner's timely objection that the proper predicate had not been laid, all of the corporate records were admitted for record purposes. (S/F II-473-474).

Martha Hodges, the former secretary-treasurer of Petrowest, testified that in the course of her employment with Petrowest she kept certain records. (S/F III-803). The State then showed her numerous corporate records (such as LP-1 through LP-102 and WPZ-1 through WPZ-213). Ms. Hodges testified that she was not the custodian of these records and that in large part she had no personal knowledge as to how they were prepared. (S/F III-837, 844, 853, 863). Numerous corporate records were admitted through Ms. Hodges testimony over the Petitioner's objections to the failure of the State to lay a proper predicate for their admission. See: S/F 850, 858-859, 864, 868, 872, 880, 886. See also: S/F II-816-819, 837-838).

It is well established that documents such as those complained of constitute hearsay and are not admissible unless and until the proponent of the exhibits lays a proper predicate pursuant to the Texas Business Records Act, TEX. REV. CIV. STAT. ANN. art. 3737e (1965). *Porter v. State*, 623 S.W.2d 374, 384 (Tex. Crim. App. 1981). That statute specifically requires testimony that the documents were (1) made in the regular course of business, (2) by an employee or representative of the business with personal

knowledge of its contents, (3) at or near the time in question. *Gassett v. State*, 532 S.W.2d 328, 330 (Tex. Crim. App. 1976).

It is incumbent upon the proponent of the exhibit to establish the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination. *Burleson v. State*, 585 S.W.2d 711, 713 (Tex. Crim. App. 1979); *Cruiz v. State*, 645 S.W.2d 498, 503 (Tex. Crim. App. 1982); *Porter v. State*, supra at 384. To this end, the statute requires that both the identity and mode of preparation of the document come from testimony by "the entrant, custodian or other qualified witness". TEX. REV. CIV. STAT. ANN. art. 3737e (1)(c) (1965).

The record in this cause established that the trustee's attorney had physical custody of the documents pursuant to a subpoena and the bankruptcy proceedings. He could not, however, establish the inherent reliability of the documents nor could he lay the proper predicate for the document's admission under the Act. He could not even identify them.

Ms. Hodges testified that she recognized *a few* of the documents, but was not their custodian, nor did she have any personal knowledge how many of those records were kept or prepared.

In its opinion, the Dallas Court concluded that the combined testimony of these witnesses established the predicate for admission of these documents as business records. This conclusion is not supported in the appellate record. Reliance on "facts" to sustain a conviction, where

those "facts" are not in the record of the cause, denies the Petitioner his constitutional right to due process of law.

The formal requirements of the Business Records Act were never shown. It was, thus, error of constitutional magnitude to admit the records over the Petitioner's timely objections.

Further, the Texas Court of Criminal Appeals has expressly held that:

> "even though the formal requirements for admissibility of a business record may be shown, the business record should not be automatically admitted in evidence. The fundamental trustworthiness of the record must be evident."

Coulter v. State, 494 S.W.2d 876 (Tex. Crim. App. 1983). See also: *Porter v. State*, 623 S.W.2d 374, 384 (Tex. Crim. App. 1981). The Dallas Court totally failed to even address the second part of the missing predicate, namely: the lack of trustworthiness. This failure to address an issue raised by the Petitioner on appeal acts to deny the Petitioner due process of law. Further still, how can it be said that documents which cannot even be identified by the sponsors be sufficiently trustworthy to justify admission? Assuming, *arguendo*, that the formal predicate was shown, the records were nevertheless inadmissible due to their inherent lack of fundamental trustworthiness. The reliance on these documents to support a conviction denies the Petitioner due process of law.

In another context, this Honorable Court has had recent occasion to explore the effect of reliance on presumptively unreliable testimony for which there were

insufficient indicia of reliability in *Lee v. Illinois*, ___ U.S. ___, 106 S.Ct. 2056 (1986). In that cause the Court held that such use denied an accused his Sixth and Fourteenth Amendment rights to confront his accuser. Logically, the same rule should apply to the improper admission of hearsay documents when, as here, there is an inadequate showing that the documents are reliable and trustworthy.

IV.

Whether the Petitioner was denied due process of law and the right to be free from self incrimination when the prosecutor was permitted to cross-examine the Petitioner regarding his refusal to comply with a grand jury subpoena.

On rehearing, the Petitioner complained of the action of the prosecutor in cross-examining the Petitioner concerning his refusal to comply with a grand jury subpoena. Neither the Texas Rules of Appellate Procedure nor any Texas statute prohibits raising issues at this stage of the appellate process. The Rules of Appellate Procedure expressly provide for both amendment and supplementation of an appellant's brief "at any time when justice requires such". TEX. R. APP. PROC. 74 (o) (1988) (Appendix G). Further, the Texas Court of Criminal Appeals has expressly stated that once an appellate court's jurisdiction is invoked, the exercise of its reviewing function is limited only by its own discretion. *Carter v. State*, 656 S.W.2d 468, 469 (Tex. Crim. App. 1983); *Perry v. State*, 703 S.W.2d 668, 669-670 (Tex. Crim. App. 1986). See also: *Boutwell v. State*, 719 S.W.2d 164 (Tex. Crim. App. 1985). Neither the Dallas Court of Appeals nor the Texas Court of Criminal Appeals chose to respond to this issue.

During the direct examination of Petitioner, counsel for Petitioner offered Defendant's Exhibit Number 19 (S/F 3154). The Prosecutor was permitted to take Petitioner on *voir dire* and asked questions which prompted Petitioner's attorney to object. A hearing was then held outside the presence of the jury (S/F 3155). During such hearing it was established that the State wished to cross-examine Petitioner concerning his refusal to comply with a grand jury subpoena on June 17, 1982. The defense established that Petitioner had refused to comply with the subpoena on advice of his then counsel, Ron Gorenson, who had advised him not to comply based on Petitioner's rights concerning Article I, Section 10, of the Texas Constitution as well as for other reasons (S/F 3157-3161); that Petitioner had exercised his Fifth Amendment rights before the Dallas County Grand Jury and had declined to comply with the subpoena based on his right to remain silent and to not provide testimony against himself (S/F 3162).

Counsel for Petitioner objected that the proposed *voir dire* was in violation of Petitioner's Fifth Amendment privilege and would deprive him of a fair trial (S/F 3162-3163). Petitioner was granted a running objection to the State's cross-examination on the issue (S/F 3168). Before the jury, the prosecutor again propounded questions to Petitioner concerning the grand jury subpoena. Counsel for Petitioner objected "on the ground previously stated to this line of questioning", which would have included those in a written motion in limine of which the Court was aware (S/F 2787), as well as those made in a previous hearing outside the presence of the jury (S/F 2787-2796).

Over such objections the Court permitted the following cross-examination (S/F 3170):

> "Q. (By Mr. Webster) This document and other documents subpoenaed were not turned over to the Dallas County Grand Jury pursuant to that subpoena by you, isn't that correct?
> A. (By Petitioner) The documents were not turned over by me.
> Q. And you refused to comply with the subpoena?
> A. I did."

Generally, once a defendant voluntarily takes the stand he may be impeached and made to give evidence against himself except where there are overriding constitutional or statutory prohibitions. *Cuellar v. State,* 613 S.W.2d 494 (Tex. Crim. App. 1981). However, the use of a defendant's exercise of Fifth Amendment rights against him is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. See: *Franklin v. State,* 606 S.W.2d 818 (Tex. Crim. App. 1979), holding on rehearing that it is impermissible under the Texas and United States Constitutions to allow comment at trial on the accused's exercise of his constitutional privilege against self-incrimination during pre-trial hearings; *Coleman v. State,* 644 S.W.2d 116 (Tex. App. – Austin 1982, PDR ref'd.), holding that the Texas and United States Constitutions prohibit a prosecutor from questioning a defendant as to his failure to appear before a grand jury; and *Rogers v. State,* 71 S.W. 18 (Tex. Crim. App. 1902), holding the fact that an accused declined to go before the grand jury could not be used against him. Also see: *Sanchez v. State,* 707 S.W.2d 575 (Tex. Crim. App. 1986); and *Wainwright v. Greenfield,* 474 U.S. ___, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986).

The trial court apparently allowed such cross-examination due to the mistaken belief that the issue had been opened up by direct examination of Petitioner. See the trial judge's comments on this topic (S/F 3158-3159). Counsel for Petitioner objected to the Court's interpretation after pointing out that there had been one question about a subpoena from the Trustee in Bankruptcy rather than the grand jury and that any other testimony about subpoenas would have pertained to SEC subpoenas rather than the grand jury subpoenas (S/F 3159-3160).

The question concerning a subpoena from the Trustee in Bankruptcy (S/F 3046) apparently was a mistaken reference by counsel for Petitioner to a Bankruptcy take-over order. The prosecutor mistakenly stated it was a reference to the Dallas County Grand Jury and SEC (S/F 3046). In any event, counsel for Petitioner rephrased the question as follows: "In connection with the Trustee acquiring records from your organization, how was that done?" (S/F 3046). Petitioner answered in detail concerning negotiations between the parties. Such questions and answers certainly do not "open up" the Petitioner's refusal to comply with a grand jury subpoena.

The trial judge quoted an answer of Petitioner in support of the judge's statement that the topic of Petitioner's refusal to comply with a grand jury subpoena had been opened up, stating "Mr. Matlock said a subpoena was sent for every business record in the world and the records sent" (S/F 3159). This quote is based on Petitioner's testimony concerning statements he made to Bob Crouch on December 8, 1981 (S/F 2957). The record abundantly reflects that Petitioner's testimony concerned the SEC subpoenas and in no manner referred to the

grand jury subpoena issued many months later on June 17, 1982. The fact that the conversation concerned the SEC investigation is shown by at least five references to the SEC and SEC investigation in the description of this specific conversation. For example, the following is a summary of the most pertinent questions by Petitioner's attorney and Petitioner's answers (S/F 2953-2958).

> "Q. Now, on that day will you tell the jury whether or not you had a conversation with Mr. Crouch about the SEC investigation? (S/F 2955). [Note that "that day" is December 8, 1981 (S/F 2953-2954).]
> A. I did.
> Q. Now, what did you discuss with him?
> A. Our understanding of the reasons of the or the status of the investigation . . . when the formal action would by concluded by the SEC . . .
> Q. At that time how concerned were you about the SEC investigation?
> A. I was not worried . . . I was irritated by it.
> Q. Did you so communicate it to Mr. Crouch?
> A. I am sure I communicated both; that I was not worried and was irritated.
> Q. What were your irritations at that point?
> A. . . . expense for accountants that we didn't want or need.
> Q. Concerning the accounting information that was being asked for . . . how did you view that?
> A. I didn't understand – they simply asked for everything we had. I don't know what they were asking for. They sent subpoenas that simply asked for everything – every business record in the world, and the materials were delivered to them and in what sequence, I don't know personally.
> Q. Did he seem alarmed about the investigation after you explained it from your viewpoint?
> A. No. I think . . . certainly I think he was aware of the SEC's activities in terms of . . . of it being an SEC matter . . . " (S/F 2958).

The full content of Petitioner's conversation with Mr. Crouch was very essential to Petitioner's defense. Bob Crouch was the State's witness who had earlier testified to an extraneous offense, claiming that Petitioner had formed a joint venture with him and had taken his monetary contribution without telling him of the SEC investigation (S/F 1713-1898). A hearing was held in which the State's theory concerning the extraneous offense is summarized (S/F 1726-1731). Mr. Crouch testified he invested on December 11, 1981, and was not informed of the SEC investigation until December 18, 1981. Counsel for Petitioner cross-examined Mr. Crouch concerning Petitioner's position that he had discussed the SEC investigation with Mr. Crouch on December 8, 1981 (S/F 1870-1871). Then on direct examination Petitioner testified that in a conversation on December 8, 1981, he had informed Mr. Crouch of the SEC investigation (S/F 2953-2958) which testimony contained the references to subpoenas that the Court mentioned in its ruling.

Thus, it is wholly clear that Petitioner was testifying about SEC subpoenas rather than grand jury subpoenas, that the time frame in question was months before the grand jury subpoena was issued, that Petitioner's purpose was to relate comments about the SEC that he made to Mr. Crouch on December 8, 1981, thereby establishing that he had informed Mr. Crouch of the investigation prior to Mr. Crouch making an investment. Petitioner was certainly making no blanket statement that he had complied with all subpoenas as might open up non-compliance with the grand jury subpoena, and the Court was clearly in error in ruling otherwise.

Even if an issue had been raised or opened up concerning refusal to comply with grand jury subpoenas, which it was not, the recent ruling of this Honorable Court in *Wainwright v. Greenfield*, supra, indicates that exercise of Fifth Amendment rights should not be used to counter a defense unless there is a totally compelling reason from doing so.

Additionally, the prosecutor advanced the theory that the refusal to comply should be admitted as the records in question were corporate records and partnership records and, therefore, Petitioner could not claim a Fifth Amendment right to decline to turn them over to the grand jury (S/F 2793). The prosecutor's theory is clearly wrong. See: *Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984); and *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), which hold that an individual may assert a Fifth Amendment right to refuse to turn over corporate records, as the act of producing documents itself may constitute personal testimony incriminatory in nature.

Additionally, in the face of Petitioner's assertion of a Fifth Amendment right, the prosecution failed to come forward with proof of the exact nature of the subpoenas and failed to establish facts that would support a finding that Petitioner was not entitled to claim such right. Further, the prosecution did not obtain a ruling to such effect from the Court. In fact, the Judge stated he was not ruling on such issue (S/F 3158). In any event a ruling by the Court that Petitioner had no Fifth Amendment right to decline to comply with the grand jury subpoena would

not have been supportable by the facts in the record or by the law concerning this matter.

The prosecutor knowingly used Petitioner's exercise of Fifth Amendment rights against him as support for the prosecutor's otherwise unsupported theory that Petitioner's defense exhibits were business records that had been fabricated after his indictment. See the prosecutor's remarks to the trial judge (S/F 2789-2794) and the judge's comment that the State was questioning whether the documents Petitioner was offering "were part of the business records or perhaps something that was made up for purposes of this trial or whatever" (S/F 2792). In further cross-examination of Petitioner, the prosecutor again asked questions concerning the refusal to comply with the grand jury subpoena (S/F 4095). In closing argument the prosecutor referred to the appellant's exhibits speaking of "records that he *claims* existed all along" . . . (Emphasis added) . . . "now we see he brings all these records down here and says these weren't turned over to the trustee. The grand jury subpoenaed records from him and he refused." (S/F 4109).

Such cross-examination and the inferences drawn therefrom which were argued by the prosecution were prejudicial to Petitioner's case and deprived him of a fair trial.

Petitioner relied on advice of counsel and on the Fifth Amendment promise that a citizen has a right to decline to produce evidence against himself. The prosecution used such exercise by Petitioner as "proof" that Petitioner's defense exhibits must have been manufactured at a later date. One can hardly imagine a more

harmful and unfair use by the prosecutor of Petitioner's exercise of rights. Additionally, mere proof that an accused exercised his Fifth Amendment rights and refused to comply with a grand jury subpoena would tend to prejudice him in the eyes of most jurors.

Petitioner submits pursuant to *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that before a Federal constitutional error can be held harmless, it must be determined beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Petitioner was convicted of count six of the indictment which alleged that he sold a security to Dale Rindlesbacher and intentionally failed to disclose to him a material fact. The "material fact" as alleged in the indictment concerns the transfer of funds from seven named limited partnerships to a corporation, then to three other named limited partnerships. Petitioner was the sole witness to his defense to this count and testified to facts that, if believed by the jury, would have resulted in his acquittal (S/F 3208-3234). In essence, he testified that he did not intentionally fail to reveal the "material fact" as he did not perceive that there was anything wrong with the transfers (S/F 3214, 3219), as the transfers were legally authorized by contracts and documents which he introduced as Defense Exhibits 22 through 30 (S/F 3208, 3223, 3228). The prosecutor on two occasions *voir dired* Petitioner concerning whether Petitioner had these documents in his possession on June 19, 1982 (the date of the grand jury subpoena) (S/F 3209, 3224) thereby reminding the jury of his theory that the documents were fabrications. The prosecutor's supposed proof that Petitioner had manufactured his defense exhibits, and failed

to cooperate with the grand jury undoubtedly undermined Petitioner's credibility in the eyes of the jury and caused the jury to doubt the authenticity of his documents and thereby contributed to the verdict obtained.

CONCLUSION

Petitioner believes that this Petition raises issues of exceptional importance which were either incorrectly decided or not resolved below. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-84-00030-CR

MERLE LEE MATLOCK, APPELLANT,	**FROM A DISTRICT COURT**
V.	
THE STATE OF TEXAS, APPELLEE.	**OF DALLAS COUNTY, TEXAS**

BEFORE CHIEF JUSTICE GUITTARD AND JUSTICES
AKIN AND HOWELL
OPINION BY JUSTICE AKIN
DECEMBER 31, 1986

On motion for rehearing, we withdraw our former opinion and substitute this one. Merle Lee Matlock appeals his conviction by a jury for violation of the State's securities act, a third degree felony. His punishment was assessed at incarceration for five years in the Texas Department of Corrections and imposition of a $5,000.00 fine. In fifteen grounds of error, appellant asserts that: (1) the evidence is insufficient as the alleged securities were not offered to Dale Rindlesbacher "acting as the agent for Enersearch West 1981, a limited partnership" as Enersearch West was never created; (2) the evidence is insufficient as the alleged securities were offered and sold to a joint venture and not to the complainant as charged in the indictment; (3) the evidence is insufficient to show that any funds were "commingled" on March 6, 1981, as the record reflects the transfers of monies at issue were pursuant to a binding contract; (4) the evidence is

insufficient to show that the transfer of funds to Explorer Energy's account on March 6, 1981, was a material fact; (5) the evidence is insufficient to show that the named interests sold or offered for sale were securities as that term is defined; (6) the evidence is insufficient to show that the appellant sold or offered for sale the named interests in oil and gas leases and wells; (7) the evidence is insufficient as a matter of law since the provisions of the Texas Securities Act are not applicable to the present transaction; (9) the trial court erred in failing to dismiss the instant indictment upon the appellant's motion as it is based upon a 1973 amendment to the Securities Act which failed to comply with the mandatory provisions of article III, sec. 35 of the Texas Constitution; (10) the trial court erred in failing to dismiss the instant indictment upon the appellant's motion because the indictment fails to specify which of the statutory alternative definitions of the term "security" the State intended to rely on to convict the appellant; (11) the indictment fails to allege an offense; (12) the trial court erred in overruling the appellant's motion to quash the instant as it is in violation of the doctrine of *in pari materia;* (13) the trial court erred in overruling the appellant's motion to quash the instant indictment as it omits an element of the offense; (14) the trial court erred in overruling the appellant's motion to quash the instant indictment as it fails to provide the appellant with constitutionally mandated notice of the nature of the material fact which the appellant allegedly failed to disclose; and (15) the trial court erred in admitting certain business records because their fundamental trustworthiness was never established. Because these

contentions lack merit, we affirm the judgment of the trial court.

Matlock was charged with various violations of the State Securities Act. The indictment contained six counts alleging fraud in connection with the sale of securities, but Matlock was convicted only of the sixth count alleged in the indictment. That count alleged that Matlock, on or about December 31, 1981, did intentionally and knowingly, directly and as an agent, "sell or offer for sale" to the complainant, Dale Rindlesbacher, who was acting on behalf of Enersearch West 1981 Limited Partnership, certain securities, to-wit:

> fractional undivided interest in and to each of the following oil and gas wells: the Bishop lease well #1, located in Montgomery County, Kansas; the Esch lease wells #16 and #25, located in Elk County, Kansas; the Harlan lease well #2, located in Young County, Texas; the Chapman lease #5, located in Okfuskee County, Oklahoma; and the Shepard lease well #1, located in Young County, Texas.

The indictment further alleged that Matlock committed a fraud upon the complainant by failing to disclose at the time of the sale or offer for sale that, on or about March 6, 1981, funds invested in six named limited partnerships were "commingled" into an Explorer Energy bank account and that a portion of those funds were used to pay quarterly distributions to investors in three other named limited partnerships, which information was a material fact.

We will discuss the facts of this case only to the extent necessary to deal with the issues raised on appeal. Matlock was a shareholder and officer in a number of

affiliated corporations, including Petrowest Energy. Petrowest's main function, apparently, was to obtain investors to join it in a number of limited partnerships and/or joint ventures, in which Petrowest was commonly the general partner or managing joint venturer. Explorer Energy was commonly the operator of the various oil and gas leases owned by Petrowest, the limited partnerships, and the joint ventures. In this capacity, Explorer Energy would enter into a "turn-key drilling contract" with the owner of the oil and gas lease. Under such a contract, Explorer Energy was obligated to act (for a fixed price) as "operator" of the lease, drill it, and do whatever work was necessary to bring the wells into production. Explorer Energy was also to collect all income from the production of the wells and to distribute the profits to the owners of the leases, after rent and royalties were paid. Thus, money would be paid from Petrowest or directly from limited partnerships to Explorer Energy under the turn-key drilling contract. Explorer Energy would pay money from its accounts to limited partners or partnerships for the distributions of profits due them. There was some evidence, however, that very little money was actually generated from production of the wells, and that most of the money distributed to the limited partners was simply new investment funds from new limited partners. This, at least, is what the State sought to prove.

During the spring of 1981, Matlock and the complainant began negotiations concerning creation of a limited partnership, to be called Enersearch West 1981 Limited Partnership. Complainant's corporation, Bach Investments, was to be the general partner in this limited

partnership, and complainant and his associates were to obtain investors who would be the limited partners. Upon formation, the limited partnership would pay its capital to Petrowest, a corporation controlled by Matlock and of which he was the president. In return for the capital, Petrowest would contribute a percentage ownership in eight specified properties to the limited partnership. However, none of these eight properties are among those alleged in the indictment. Furthermore, this particular arrangement was never consummated because the complainant found he was unable to raise the capital required under the original agreement. Consequently, sometime late in 1981, complainant and Matlock agreed that Enersearch West 1981 Limited Partnership would, instead, join with another "undersubscribed" limited partnership to form a joint venture named Western Reserves 1981 Joint Venture.

In deciding this case, we must first address Matlock's insufficiency grounds because if we reverse on the grounds of insufficiency of the evidence he must be acquitted. *Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978).

In his first ground of error, Matlock contends that the evidence is insufficient because it fails to establish that Enersearch West 1981 Limited Partnership ever existed. We disagree. Although it is true that no documentary evidence of the formation of this Utah limited partnership was introduced, the complainant testified that he formed Enersearch West 1981 Limited Partnership, and a number of documents introduced into evidence apparently refer to that entity. The complainant testified that one of his companies, Bach Investments, was to be a

general partner in Enersearch West 1981 Limited Partnership. One million dollars and a minimum of ten subscriptions were to be raised by December 31, 1981. Bach Builders, Inc., one of complainant's companies, bought three of the subscriptions in order to meet the requisite ten subscriptions to complete the formation of Enersearch West 1981 Limited Partnership. Matlock prepared a letter and sent it to the other limited partners, announcing the "formation and registration of Enersearch West 1981, a Utah limited partnership, created to explore, develop and produce oil and gas properties, primarily within the Southwestern United States," and describing the various drilling activities the partnership expected to undertake. The letter identified Bach Investments, complainant's company, as the offeror of the shares in Enersearch West 1981 Limited Partnership. Further, the complainant testified that he turned money over to Matlock on behalf of "Enersearch West Limited Partnership," which he represented. The letter was admitted into evidence in the trial court. This evidence is sufficient to support the finding that Dale Rindlesbacher, the complainant, was acting on behalf of Enersearch West 1981 Limited partnership when Matlock offered him the securities.

Matlock's second ground of error asserts that the evidence is insufficient because the alleged securities were offered and sold to a joint venture and not to the complainant as charged in the indictment. Again, we disagree. Once again, the complainant testified that he and the limited partnership were to "own" the oil and gas interest, not the joint venture. Although the documents introduced into evidence specifically provide that

the wells and/or leases will be transferred to the joint venture, the testimony of the complainant is sufficient to show an agreement to transfer these interests to the limited partnership instead.

In his third ground of error, Matlock contends that the evidence is insufficient to show that any funds were "commingled" on March 6, 1981, because the evidence shows that the transfers were pursuant to binding contracts. This argument presumes that "commingling" means more than the simple fact that funds from various sources are transferred into one account. In fact, Matlock assumes that the physical mixture of funds must be, in some sense, unjustified or wrongful in order to amount to "commingling." In civil law, the term "commingling of assets" applies to the wrongful act of a fiduciary in mixing the assets of his beneficiary with his own or other assets so that the beneficiary's assets cease to be readily distinguishable. *Mooers v. Richardson Petroleum Co.*, 201 S.W.2d 134, 140-41 (Tex.Civ.App. – San Antonio 1946), *rev'd on other grounds*, 146 Tex. 174, 204 S.W.2d 607, 607-08 (1947). In such a situation, the mixing of assets is wrongful in and of itself because of the fiduciary relationship which exists. In this case, however, the indictment did not allege any fiduciary relationship. Indeed, the commingling of funds itself is nowhere asserted to have been an illegal or wrongful act. Only the failure to disclose this fact is alleged to have been fraudulent. Thus, we see no reason to extend the meaning of "commingled" in this situation beyond its common, everyday meaning of "mixed together."

Ed Stauffer testified that he invested in Energy Associates 79 and in Enersearch West 1981 Limited. As part of

a distribution for Energy Associates 79 Partnership, he received a check for $2,606.00 written on or about March 6, 1981. Stauffer identified this check from the check register of Energy Associates 79 Partnership which was admitted into evidence, and identified other transfers between various bank accounts relating to count six in the indictment. Stauffer also testified that funds from trustee accounts, identified as accounts relating to the Western Reserves Limited Partnerships, were transferred into the Explorer Energy account in the National Bank of Commerce. Stauffer testified further that on or about March 6, 1981, six partnerships deposited funds into the Explorer account, and that a portion of those funds was used to pay distributions to three limited partnerships, Western Pay Zones, Energy Associates 1979, and Enersearch Limited 79-B. Consequently, sufficient evidence exists to show that the funds were commingled into the account of Explorer Energy.

In Matlock's fourth ground of error he contends that there is insufficient evidence to show that the transfer of funds on March 6, 1981, was a "material fact." The term "material fact" is not statutorily defined, but is has been defined in the case law to mean a fact which there is a "substantial likelihood that a reasonable shareholder would consider important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Stated differently, the standard contemplates a "showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor]." *Id. TSC Industries* was quoted by the Texas Court of Criminal Appeals in *Morgan v. State*, 557 S.W.2d 512, 515

(Tex.Crim.App. 1977), as authority for the proper definition of "material fact" under the Texas Securities Act. Under *TSC Industries*, the issue of materiality was characterized as a mixed question of law and fact. *TSC Industries*, 426 S.W.2d at 450. The supreme court went on to say that the determination requires "delicate assessments" of inferences to the "reasonable investor." Such assessments are "peculiarly ones for the trier of fact." *Id.* We agree that a determination of materiality is peculiarly within the province of the jury.

The complainant in this case stated that he would have considered the information that these transfers occurred to be important, that this information would have affected his decision to invest, and that, in fact, he would not have invested had he known of the transfers and that some of the funds so transferred would be distributed to other investors. From this, the jury had sufficient evidence to judge whether, under the objective test established for materiality, there was a substantial likelihood that a "reasonable investor" would consider the information important in deciding whether or not to invest.

In his fifth ground of error, Matlock contends that the evidence is insufficient to show that the named interests sold or offered for sale were "securities" as that term is defined in the Texas Securities Act. He argues that the term "security" is intended to include only "documents, certificates or other instruments which represent ownership rights in property." Matlock asserts that there was no evidence of documents evidencing ownership rights in this case, and, consequently, that there is insufficient evidence to prove that the named interest in the oil and

gas leases and wells were securities. The State apparently concedes that there were no documents or instruments constituting "securities" that were exhibited to the complainant on December 31, 1981, the alleged date of the offer. The State argues that documentary evidence is not necessary, that a "security" is a "chose in action" which is commonly, though not necessarily, represented by some document, but that document itself is not the security. Without determining whether the statute necessarily requires a written document identifiable as a "security," we conclude that the evidence here shows that the parties to the transaction contemplated that the "fractional undivided interests" in the mineral leases alleged in the indictment would be described in written documents evidencing an "investment contract," and, therefore that the evidence is sufficient to show a sale of a "security" as defined in the Act.

The Texas Securities Act states that the term "security" shall have the following meaning, unless the context requires otherwise:

> A. The term "security" or "securities" *shall include* any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, *investment contract, or any*

> *other instrument* commonly known as a security, whether similar to those herein referred to or not. [Emphasis added.]

TEX.REV.CIV.STAT.ANN. art. 581-4(A) (Vernon 1964). The term "investment contract" has been construed as follows:

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.

S.E.C. v. W.J. Harvey Co., 328 U.S. 293, 301 (1946). This construction has been adopted in Texas, except that the profits need not be expected to come *solely* from the efforts of others; rather, the test is whether the efforts of those other than the investor are undeniable significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Searcy v. Commercial Trading Commission*, 560 S.W.2d 637, 640-41 (Tex. 1977); *Bruner v. State*, 463 S.W.2d 205, 212 (Tex.Crim.App. 1970); *Wilson v. Lee*, 601 S.W.2d 483, 486 (Tex.Civ.App – Dallas 1980, no writ). Furthermore, in *Searcy* the court did not view as controlling the fact that the investors had the *right* to actively participate in the enterprise. The court instead looked to the substance of the transaction and, because the seller exerted "significant investment efforts," while the investor was not required to and seldom did actively participate, held that the "significant efforts" part of the test had been met.

In this case the evidence is sufficient to show that the parties contemplated an investment contract embodied in one or more written documents. The State introduced into evidence a written document entitled "Joint Venture

Agreement Western Reserves 1981-III Joint Venture" which stated as follows:

> This agreement is made and entered into as of the 31 day of December, 1981, by and between PETROWEST, INCORPORATED, a Texas corporation, and ENERSEARCH WEST 1981, a Utah limited partnership and WESTERN RESERVES 1981-III.

According to this agreement, the investors money would be paid to Petrowest, which would make all of the development decisions and distribute the profits from the oil and gas leases and wells. Attached to this document is an exhibit identifying the particular leases specified in the indictment. Also, Matlock delivered to the complainant a more specific written description of the "fractional undivided interest" several weeks later. The complainant testified that these documents were furnished pursuant to his agreement with Matlock on December 31, 1981. The statute does not require that documentary evidence of the security sold be exhibited to the complainant when the sale is agreed upon. Consequently, we hold that this evidence is sufficient to show that the interests sold or offered for sale were embodied in written documents evidencing an "investment contract," and, therefore, that the transaction was a sale of a "security" within the Act.

Matlock's sixth ground of error asserts that the evidence is insufficient to show that Matlock sold or offered for sale the named interest in oil and gas leases and wells. We disagree. Matlock correctly asserts that the allegation of the specific wells and leases named in the indictment was a specific allegation of that which is legally essential to charge the offense because it elaborates upon an essential element of the offense – the security. *Franklin v. State,*

659 S.W.2d 831, 834 (Tex.Crim.App. 1983). Consequently, the State had the burden of proving that these specific interests, namely:

> fractional undivided interests in and to each of the following oil and gas leases and wells: the Bishop lease Well #1, located in Montgomery County, Kansas; the Esch lease Wells #16 and #25, located in Elk County, Kansas; the Harlan lease Well #2, located in Young County, Texas; the Chapman lease #2 and the Chapman lease #5, located in Okfuskee County, Oklahoma; and the Shepard lease Well #1, located in Young County, Texas,

were sold or offered for sale by Matlock.

The complainant testified that in April, Matlock or his agent gave the complainant a schedule of oil and gas leases and wells, which schedule verified that specific oil and gas leases and wells in which the complainant's limited partnership had been sold an interest. This schedule was admitted into evidence. The business records of Matlock's company, Petrowest, Inc., were tendered into evidence and contain the Turnkey Drilling Agreement and Completing Contract dated December 31, 1981. The Turnkey Drilling Agreement names the specific leases that appear in the indictment, and is signed by Matlock. Another document introduced by the State entitled "Contribution and Percentage of Ownership for the Western Reserves 1981-III Joint Venture" lists each lease specified in the indictment and each contributor's percentage of ownership of the working interest. Matlock did not raise the defense at trial that the specific leases named were not the leases sold to the complainant; to the contrary, he admitted in his testimony that four of the five leases and wells named in the indictment were those

sold to the complainant. The evidence further reveals that Matlock knew which specific leases and wells were to be assigned to the partnership by December 31, 1981, because Matlock and the complainant knew that the turnkey drilling contracts had to be signed by December 31, 1981, in order for complainant's partnership to receive tax benefits. Consequently, the evidence is sufficient to show that Matlock sold or offered for sale the specific interests named in the indictment.

Matlock's seventh ground of error, and final insufficiency ground, contends that the evidence is insufficient as a matter of law since the provisions of the Texas Securities Act are not applicable to the present transaction because it concerned an investment in a joint venture. Matlock cites *Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704, 709 (Tex. 1956) for the proposition that "it is well settled that the [Texas Securities] Act does not apply to joint venturers and to transactions between joint venturers. . . ." Matlock asserts that because the evidence shows that the complainant's limited partnership was a member of a joint venture, and because the joint venture itself, not the limited partnership, was to receive the interest in the oil and gas wells and leases, that the Texas Securities Act does not apply. We cannot agree. Although the documents state that the joint venture was to receive the interests, the documents are not necessarily controlling. *Bruner*, 463 S.W.2d at 214. Consequently, we must look to the substance of the entire transaction, examine all the surrounding circumstances, and recognize that the real nature of the transaction is the controlling element. *Id.* Here, the evidence was sufficient to prove that the

securities were offered for sale or sold to the complainant, acting on behalf of Enersearch West Limited Partnership–not the joint venture. The complainant testified that the agreement was with the limited partnership. The schedule identifying the specific interest also specifically identified the limited partnership as the proposed or actual recipient of the interest. Furthermore, even if the "joint venture" were the relevant entity in this inquiry, there was sufficient evidence to find that it was not, in substance, a true joint venture. The complainant testified that he had no control over the operations of the enterprise, and in summary provided sufficient evidence that an investment contract, not a joint venture, was contemplated in fact. In conclusion, we overrule all of Matlock's insufficiency of the evidence grounds of error.

Matlock's eighth ground of error contends that the Texas Security Act was not applicable to the present transaction. We disagree. As stated above, since an investment contract was contemplated by the parties, the present transaction falls within the definition of a security and is therefore subject to the terms and conditions of the Texas Securities Act. Thus, this ground of error is overruled.

Appellant next contends that his conviction must be reversed because the caption of the 1979 amendments to the statute under which he was convicted was defective because it failed to "advise the reader of the complete redrafting of the penal provisions of the Securities Act." We find nothing in our constitution that mandates this degree of specificity in captions. In this respect, the constitution only commands that "if any subject shall be embraced in an act, which shall not be embraced in the

title, such act shall be void as to so much thereof as shall not be so expressed." Tex. Const. art. III, sec. 35. All that is required is that the title or caption of a bill provide a reasonable reader with fair notice of the subject matter of the contents of the bill. *See White v. State*, 440 S.W.2d 660, 664 (Tex.Crim.App. 1969). It is well-settled that this requisite is satisfied when the caption of an amendatory act refers to the article to be amended by number, so long as the subject matter of the amendatory act does not exceed that of the statute sought to be amended. *Smith v. Davis*, 426 S.W.2d 827, 833 (Tex. 1968); *Board of Water Engineers v. City of San Antonio*, 155 Tex. 111, 283 S.W.2d 722, 726-27 (1955); *Pittman v. State*, 134 Tex. Crim. 494, 116 S.W.2d 1080 (1938); *Morgan v. State*, 134 Tex. Crim. 490, 116 S.W.2d 1079, 1080 (1938); *Walker v. State*, 134 Tex. Crim. 500, 116 S.W.2d 1076, 1078 (1938).

Appellant was tried and convicted under section 29 of article 581 of the civil statutes, which provides criminal punishment for various types of conduct. The challenged caption to the 1979 amendatory act informs the reader that the act relates "to regulation of the offer and sale of securities; amending The Securities Act (Articles 581-1 et seq., Vernon's Texas Civil Statutes) as follows: amending subsection E of section 4, subsection A of section 7, subdivision (2) of subsection A of section 33, sections 5, 6, 22, 23, and 29; and adding section 35-1; providing penalties." Act of May 15, 1979, Ch. 160, 1979 Tex. Gen. Laws 348 (emphasis added). These amendments, in large measure, simply described the prohibited conduct in greater detail and added a new criminal proscription for violation of advertising regulations. *See* Act of May 15, 1979, Ch. 160, sec. 7, 1979 Tex. Gen. Laws 359, 359-61. As none

of the amendments strayed beyond the subject matter of statute prior to its amendment, we cannot hold that the amendments are unconstitutional because the instant caption would lead a reasonable reader to believe that the entire subject of penal provisions was reworked. The caption need not have given any greater notice or set out exactly what changes were made by the amendment. *See Smith*, 426 S.W.2d at 833; *see also, Ragan v. State*, 649 S.W.2d 662, 664 (Tex. App. – Waco 1983, no pet.).

Thus, appellant's reliance on *Ex parte Crisp*, 661 S.W.2d 944 (Tex. Crim. App. 1983), is misplaced. In *Crisp*, the caption in question was held insufficient because the amendatory act altered not only the Controlled Substances Act, as reflected in the caption, but also various provisions of the Code of Criminal Procedure and the Penal Code. 661 S.W.2d at 946; *see also Paster v. State*, 701 S.W.2d 843, 847 (Tex. Crim. App. 1985). The amendatory act involved in the present case does not present this problem. We hold that this caption provided ample notice of the subject of the amendments and overrule appellant's ninth ground of error.

In his tenth ground of error, Matlock contends that the trial court erred in failing to dismiss the instant indictment upon Matlock's motion as the indictment fails to specify which of the statutory alternative definitions of the term "security" the State intended to rely on to convict Matlock. We disagree. Tex. Code Crim. Proc. Ann. art. 21.12 (Vernon 1966) states,

> When a statute defining any offense uses special or particular terms, indictment on it may use the general term which, in common language, embraces the special term.

Further, when terms and elements in the indictment are statutorily defined, the definitions are essentially evidentiary and need not be further alleged in the indictment. *Ferguson v. State*, 622 S.W.2d 846, 850 (Tex. Crim. App. 1981) (on State's motion for rehearing); *Thomas v. State*, 621 S.W.2d 158, 161 (Tex. Crim. App. 1981) (on State's motion for rehearing). Therefore, because "security" is a term defined in the statutes, it need not be alleged in the indictment.

Matlock's eleventh ground of error asserts that the indictment fails to allege an offense because it does not specify any particular document, certificate or other instrument representing ownership rights in property. For the same reasons outlined above in response to Matlock's fifth ground of error, we hold that the indictment sufficiently alleged a violation of the Texas Securities Act. Accordingly, this ground of error is overruled.

Appellant next contends that we should declare the indictment void because the State alleged fraud generally under subsection one of article 581-29(c) rather than under the more specific section three, which proscribes "knowingly mak[ing] any untrue statement of a material fact or omit[ting] to state a material fact" which is necessary under the circumstances to prevent other statements from being misleading. Appellant reasons that he is therefore entitled to the benefit of the rule that if conduct is proscribed under both a general and a specific statute, then the accused must be prosecuted under the specific statute. *See Tawfik v. State*, 643 S.W.2d 127, 128 (Tex. Crim. App. 1983).

In light of the holding in *Hawkins vs. State*, 656 S.W.2d 70, 72 (Tex. Crim. App. 1983), we are compelled to agree that this is a prosecution under subsection one rather than subsection three. However, we cannot agree with the remainder of appellant's argument. As the court explained in *Tawfik*, the rule that one must be prosecuted under the specific rather than the general statute stems from the rule that specific statutes control over general enactments where the two irreconcilably conflict. *See Cagle vs. State*, 147 Tex. Crim. 354, 180 S.W.2d 928, (1944). This case differs from *Tawfik* and the cases relied upon by appellant in that there is no *conflict* between subsections one and three. Quite plainly they address different circumstances. To prove culpability under subsection one for failing to disclose a material fact, the State must prove that the omission was *intentional*. In contrast, under subsection three, it need only prove that the accused acted *knowingly*. *Compare* Tex. Rev. Civ. Stat. Ann. art. 581-4(F) (Vernon 1969) (defining "fraud" under the Securities Act) *with* Tex. Rev. Civ. Stat. Ann. art. 581-29(C)(3) (Vernon Supp. 1986) (knowing omissions of fact). However, if it can only prove this lesser degree of mental culpability, then the State must also show that disclosure of the information alleged to have been withheld was necessary to make the other statements of the accused not misleading. Thus, we have here no conflict at all between a general and a specific provision. Instead, it is apparent that the legislature added subsection three to expand the scope of conduct culpable under subsection one. Because these subsections do not attempt to regulate conduct that would necessarily constitute an offense under both subsections, there is no occasion for application of the

doctrine "in pari materia" and the resulting rule that the accused must be charged under the more specific proscription.

In Matlock's thirteenth ground of error he contends that the trial court erred in overruling his motion to quash the instant indictment because it omits an element of the offense. Specifically, Matlock complains that the indictment failed to allege that he failed to disclose a material fact which was "necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." We disagree. Matlock's fourteenth ground of error contends that the indictment failed to provide that degree of notice constitutionally mandated concerning what made the material fact alleged in the indictment misleading. Since these two grounds of error relate to the same aspect of the indictment, we will address them together.

The indictment alleges the omission to disclose information of a material fact as follows:

> That on or about the 6th day of March, 1981, funds invested by investors in the Western Reserves 1980, Western Reserves 1980-A, Western Reserves 1980-B, Western Reserves 1980-III, Western Reserves 1980-IV, and Western Reserves 1980-V Limited Partnerships were commingled into the Explorer Energy bank account, #06-917-9 at the National Bank of Commerce, Dallas, Texas, and a portion of said funds were used to pay quarterly distributions to investors of the Western Pay Zones, Energy Associates 79, and Enersearch Limited 79-B Limited Partnerships, and the said information said Merle Lee Matlock and the said Merle Lee Matlock, directly and as an agent, then and there, intentionally failed to disclose said information for the purpose of inducing the said Dale

> Rindlesbacher to purchase said securities, and the said information being a material fact.

These arguments attacking the indictment were addressed by the Court of Criminal Appeals in *Hawkins vs. State*, 656 S.W.2d 70 (Tex. Crim. App. 1983). In that opinion, that court held that an indictment containing the same language as the indictment in question was not fundamentally defective. Because these arguments have been dismissed by the court of criminal appeals, we are not at liberty to hold otherwise. Thus, Matlock's thirteenth and fourteenth grounds of error are overruled.

Matlock's final ground of error contends that the trial court erred in admitting certain business records as their fundamental trustworthiness was never established under the business records exception to the hearsay rule. We disagree. The business records exception is delineated in Tex. Rev. Civ. Stat. Ann. art. 3737e (Vernon Supp. 1986) which states,

> Section 1. A memorandum or record of an act, event or condition shall, insofar as is relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:
>
> (a) It was made in the regular course of business;
>
> (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
>
> (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

> Section 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

At trial, an accountant who had been employed by both Petrowest and the trustee appointed in Petrowest's bankruptcy testified that certain accounting records were kept by Petrowest and were turned over to the trustee when bankruptcy was declared. The accountant identified each document as a record of Petrowest, Explorer Energy, or a related corporation, and testified that these records were made in the regular course of business by employees who had personal knowledge of the events necessary to make the records and were made at or near the time of the events. The attorney for the trustee in bankruptcy of Petrowest identified the same records and testified that they had been in his custody since July of 1982. The former corporate secretary/treasurer of Petrowest, who was also an advisory director and personal secretary to Matlock, testified that she prepared the checks and kept the check register records for Petrowest and the other related corporations. She also testified that as office manager of Petrowest, she had access to all of the business records kept and maintained at the Alpha Tower office of Petrowest, and identified the records

accordingly. The combined testimony of these three witnesses is sufficient to meet the requirements of the business records exception. Thus, Matlock's final ground of error is overruled.

Affirmed.

/s/ TED M. AKIN
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 90

8400030.RF

APPENDIX "B"

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-84-00030-CR

MERLE LEE MATLOCK,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

FROM A
DISTRICT COURT

OF DALLAS COUNTY,
TEXAS

BEFORE CHIEF JUSTICE GUITTARD AND JUSTICE HOWELL AND THOMAS[1]
OPINION BY JUSTICE THOMAS
MARCH 5, 1987

ON MOTION FOR REHEARING

This opinion supplements our opinion of December 31, 1986. In his motion for rehearing, Matlock contends that, in determining the sufficiency of the evidence, this court erred in failing to measure the evidence by the charge submitted to the jury, as required by *Boozer v. State*, 717 S.W.2d 608 (Tex. Crim. App. 1984) (en banc). This argument is germane to Matlock's fifth point of error on appeal, which contended that the evidence was insufficient to show that the named interests sold or offered for sale were "securities" as the term is defined. Appellant objects to our use of the term "investment contract" since it is not within the term "security" as defined in the

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[1] The Honorable Linda Thomas, Justice, succeeded The Honorable Ted M. Akin, Justice, at the expiration of Justice Akin's term effective December 31, 1986.

charge. The charge instructed the jury that the term "security" or "securities" includes "a certificate or any instrument representing any interest in or under an oil or gas lease." We conclude that the evidence establishes the sale of interest in oil and gas leases which the parties contemplated would later be represented by a writing and provided to the buyer. Accordingly, we overrule Matlock's motion for rehearing and affirm the judgment of the trial court.

The trial court record reflects the sequence of events leading up to the sale of the oil and gas interests in question. According to testimony, in April of 1981 the complainant, Rindlesbacher, came to Dallas for the purpose of inquiring about investing in the oil and gas business. At that time, Rindlesbacher met with Matlock, who was acting as president of Petrowest Incorporated. They discussed the formation of a partnership for the purpose of raising capital to invest in the drilling of oil and gas wells. Rindlesbacher would represent the partnership in obtaining investors and invest as a limited partner, and would be required to raise the capital. In return, Matlock's company, Petrowest would decide where to drill the wells and control the operation and completion of the wells. It was Rindlesbacher's understanding that Petrowest would do the drilling, operate the wells, and distribute the proceeds to the partnership, which would acquire an interest in the oil and gas leases and wells. On July 7, 1981, Rindlesbacher returned to Dallas to meet with Matlock. At this time, Matlock prepared a partnership prospectus that represented the final version of the investment offering, and later sent copies to Rindlesbacher to present to other potential investors.

This prospectus was admitted into evidence. Rindlesbacher received the partnership prospectus in early August, 1981. The prospectus is entitled "Enersearch West 1981," and sets out the various terms of the partnership. According to the prospectus, the partnership was to raise $1,000,000 in capital contributions before December 31, 1981, and this money was to be turned over to Petrowest. The prospectus allowed a 13½% total amount of front-end cost that would be allowed to be kept by Rindlesbacher. Under the "Use of Proceeds" section of the prospectus, the language provided by Matlock stated that there would be a "twenty-five percent working interest in eight wells in Watt County, five wells in Mays County, and a working interest in Chapman No. 8 well." The "Financial Summary" section of the prospectus states that "the partnership will generally acquire up to a fifty percent working interest in each prospective well, in consideration of intangible drilling costs contribution, although this percentage may vary in some cases." "The partnership will acquire as participating member for an interest in a multiple lease which requires intangible expenditures, aggregating revenue interest." On September 2, 1981, Rindlesbacher went back to Dallas to meet with Matlock. At this time Matlock talked about the "Chapman" lease and how the wells would be drilled. On September 3, 1981, Rindlesbacher was taken to Oklahoma to visit some of the wells, and the "Chapman" well was pointed out to him. On September 22, representatives of Petrowest gave a sales presentation to prospective investors invited by Rindlesbacher, discussing Matlock's qualifications and the Petrowest Company in general. They explained to the investors that Petrowest

would furnish the oil and gas leases and pay the completion costs in return for their investment for intangible drilling costs. In October or November of 1981, Rindlesbacher received a completion program brochure prepared by Petrowest for the purpose of raising money for the completion costs. Matlock approached Rindlesbacher about investing in another partnership that Petrowest was forming, entitled "Western Reserves-III 1981". He sent Rindlesbacher brochures on the Chapman wells. Rindlesbacher elected not to invest in that particular partnership. By December 21, 1981, Rindlesbacher had sold only nine of the ten units necessary to form the partnership. He went to Dallas and informed Matlock of the situation, and Matlock told Rindlesbacher that since the ten units were not sold, Rindlesbacher could invest in another limited partnership, "Western Reserves 1981-III." Matlock told Rindlesbacher that Rindlesbacher would receive a certain percent interest in the leases and wells that were included in the prospectus; he also told Rindlesbacher that there were five wells already drilled and ready to turn on at the end of the year or the beginning of the next year. On December 22, 1981, Rindlesbacher decided to put in another unit of his own assets to meet the ten unit requirement of the "Enersearch West 1981" partnership prospectus, and tendered the money to Matlock for Petrowest. At this time a letter was also prepared to be mailed out to the limited partners. The letter was prepared by Matlock in Rindlesbacher's presence. The letter was introduced into evidence, and stated the following:

> Dear Partner: We are pleased to announce formation and registration of Enersearch West 1981, a

Utah limited partnership, created to explore, develop and produce oil and gas properties, primarily within the Southwestern United Sates. The ten units, $28,541.43 per unit plus the general partner's one percent, resulted in initial capital of $280,571.43. $268,178.54 of the capitalization is being committed to joint venture exploration in properties in the Central and Northeastern Oklahoma areas. . . . . In addition this joint venture will allow Enersearch West 1981 to participate in additional areas of interest in West Texas, Knox Field, and Southeastern Kansas, Esch lease. Although Enersearch West 1981 will own a proportion of the smaller percentage of each of the joint venture, it will own its pro rata share of the wells consistent with Enersearch West 1981 shares of the intangible drilling costs. At present we expect to participate in nine to eleven wells, with the majority expected to average 4,000 feet in depth. *The final number of wells will be determined upon initial drilling recompletion results, as well as the total capitalization.* This amendment requires that the limited partners consent to the formation of the limited partnership with less than fifty percent of the proposed capitalization which we have enclosed for you to confirm by your signature and return in the enclosed return envelope. The offeror, Bach Investments, will permit any limited partner to withdraw from the limited partnership with a full refund on his capital contribution upon notice of the receipt prior to years end, 1981. After that date, Bach Investments expect to operate the partnership on behalf of the partners as originally discussed, with K-1s for the partners' tax returns available in early March, 1982. You will be advised monthly about the debenture progress, and quarterly distributions of the partnership shares of net earnings from the venture wells will be available for distribution on or around May 15, 1982. Management and partners alike are to receive periodical updates as the program is implemented with most of the exploration and recompletion work expected to be accomplished by the summer of 1982. We are

> pleased with this modification outline herein and request your prompt attention to confirming your participation as limited partners of Enersearch West 1981, which is joined with the three other legal entities in the Western Reserve 1981-III joint venture to explore and develop and operate the referenced properties.

(Emphasis added.) Rindlesbacher then wrote two checks payable to "Western Reserves 1981 Joint Venture" on behalf of Enersearch West limited partnership and gave them to Matlock; both checks were introduced into evidence. Matlock then submitted documents for Rindlesbacher to sign. It was late in the day, and as Rindlesbacher was in a hurry to catch a plane, he signed the documents just before he went out the door of the hotel. Rindlesbacher testified that he did not notice when he signed the agreement that there was no mention of Enersearch West 1981 limited partnership as being part of this document styled "Western Reserves 1981-III Joint Venture." It was always Rindlesbacher's understanding that "Western Reserves 1981-III" was a Texas limited partnership. Matlock prepared the document, and it was not brought to Rindlesbacher's attention that Rindlesbacher's partnership was not mentioned in the document. The turnkey drilling and completion contract was dated on the same day, December 22, 1981, and was also prepared and executed by Matlock. The page of the joint venture agreement signed by Rindlesbacher was attached to the turnkey contract. Rindlesbacher testified that he believed he was signing the document on behalf of his partnership, Enersearch West 1981. Rindlesbacher testified that at the time he turned over his money he did not know the specific wells or leases that his partnership

would have an interest in because Matlock told him he would know the percentage as soon as Petrowest had all of the money collected. It was Rindlesbacher's understanding that the specific information as to the assignment of the leases and the number of leases and wells was going to be determined by Matlock at a later date. Rindlesbacher was concerned about the identity of the wells, so he called Matlock when he arrived home from Dallas sometime immediately after December 22, 1981. Rindlesbacher had a copy of the Western Reserves 1981-III prospectus, and Matlock told Rindlesbacher over the phone which wells would be producing January 1. This prospectus was admitted into evidence. Matlock told Rindlesbacher that there were two test wells in Throckmorton County, Texas on the Reynolds lease, two test wells within three leases in two Oklahoma Counties, and one lease in Elk County, Kansas, and then two more. There was a second executed turnkey drilling contract and joint venture agreement admitted into evidence entitled "Western Reserves 1981-III Joint Venture" dated December 31, 1981. This document is very similar to the document signed by Rindlesbacher on December 22, 1981. Matlock executed the document on behalf of Petrowest, Inc. and the partnership, Enersearch Western Reserves 1981-III. There was a blank for Rindlesbacher's signature on the document, but Rindlesbacher never signed it. Rindlesbacher did not receive this document or know of its existence until August 24, 1982, when it was subpoenaed from the partnership files of the trustee in bankruptcy of Petrowest. This document contained a Schedule A showing the various leases and counties where Rindlesbacher's partnership, Enersearch West

1981, had an interest, including the Bishop, Esch, Harlan, Chapman, and Shepard leases. The document also contained an Exhibit B which included the specific wells and leases and the percentage of ownership for each – both for Rindlesbacher's partnership and for Western Reserves 1981-III. Exhibit B listed the same seven leases that appear in the State's indictment and the court's charge to the jury. Since this document was executed December 31, 1981, it is written evidence of the named oil and gas interests that were sold to Rindlesbacher pursuant to the terms of the partnership agreement. Rindlesbacher finally received a schedule of the leases and wells in April, 1982.

Both federal and state courts have addressed the standard to be applied in determining whether a "security" exists or has been sold within the applicable securities act. In construing the statutory term "security" we keep in mind that the securities acts should be construed broadly as remedial legislation to effectuate their purposes. One of the central purposes of securities legislation is the protection of investors, and in effectuating that purpose, "form should be disregarded for substance and the emphasis should be on economic reality." *Tchereprin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967); *Canadian Imperial Bank of Commerce vs. Fingland*, 615 F.2d 465, 468 (7th Cir. 1980). Further, in determining whether a particular instrument is or is not a security, the courts will look to the substance and not to the form of the transaction and will examine all the surrounding circumstances, for the real nature of the transaction is the controlling element. *Bruner v. State*, 463 S.W.2d 205, 214 (Tex. Crim. App. 1970).

In determining whether a sale of a security has occurred for purposes of Section 10(b) of the Securities Exchange Act of 1934, the United States Court of Appeals held that the time of the "purchase or sale" is to be determined as the time when the parties to the transaction are committed to one another. *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2nd Cir. 1972). The Court gave the following interpretation of commitment:

> Commitment is a simple and direct way of designating the point at which, in the classical contractual sense, there was a meeting of the minds of the parties, it marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time.

Id. at 891. Texas law also follows this approach in determining when an agreement constitutes a binding contract. In *Vick vs. McPherson*, 360 S.W.2d 866, 868 (Tex. Civ. App. – Amarillo 1962, writ ref'd n.r.e.), the court held that if the parties intend their agreement to be effective from the time it is made, it will be given effect from that time though they agree or intend that a formal writing embodying its provisions shall subsequently be prepared and signed. *See also Ensenat v. Vasquez*, 366 S.W.2d 605, 611 (Tex. Civ. App. – Houston 1963, writ ref'd n.r.e.). Even where a later and formal writing is contemplated by the parties, a contract may nonetheless arise before the execution of that writing. When the parties have agreed upon all material considerations and intend to be presently bound, the later writing serves merely as a convenient memorial of previously agreed-on terms. *Garner v. Boyd*, 330 F. Supp. 22, 25-26 (N.D. Tex. 1970). (Citations

omitted). *See also Lawrence v. Securities and Exchange Commission*, 398 F.2d 276, 279 (1st Cir. 1958), where the Court held that a written commitment to deliver 500 shares of stock when issued was a "security" under the federal securities statues.

When this interpretation is applied to the facts before us, there is no question that Matlock and Rindlesbacher had a meeting of the minds as to the terms of the partnership agreement; Rindlesbacher contributed capital in return for a percentage working interest in oil and gas wells and leases that Matlock's company, Petrowest, was to acquire and operate. The prospectus of the partnership and the terms of the agreement were in final form by December 31, 1981, and further evidence the commitment between Matlock and Rindlesbacher. Thus, even though Rindlesbacher did not actually receive a schedule of the exact oil and gas leases and wells until April, 1982, the parties had agreed by December 31, 1981 as to all of the terms of the partnership and the manner in which the parties would be bound.

As to what constitutes a sale as contemplated by the Texas Securities Act, the supreme court pointed out that

> "Section 2(e) [now Sec. 4(e)] defines the term 'sale' or ' "offer for sale" ' or 'sell' as including 'every disposition, or attempt to dispose of a security for value, and provides that 'any security given or delivered with or as a bonus on account of, any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value.' The Act further defines the term 'sell' as meaning 'any act by which a sale is made, and the "sale" or "offer for sale" shall include a subscription, an

> option for sale, a solicitation of sale, an attempt to sell, or an offer to sell, directly or by an agent or salesman.' "

Brown vs. Cole, 291 S.W.2d 704, 708 (Tex. 1956). Applying this definition, the Houston Court of Appeals held that a seller's solicitation of a purchaser's participation in a group investment in retainage certificates of highway contractors and seller's furnishing of information to purchaser relative to the investment amounted to a "sale or an offer for sale of unregistered securities" in violation of the Texas Securities Act. *Smith v. Smith*, 424 S.W.2d 244, 249 (Tex. Civ. App. – Houston 1968, no writ). This broad definition of "sale" or "offer to sell" is included in the trial court's charge to the jury, and is therefore applicable in determining the sufficiency of the evidence under *Boozer v. State* in light of the charge submitted.

Matlock did substantially more than merely solicit Rindlesbacher's participation in the partnership agreement to invest in oil and gas interests. A prospectus was prepared and presented, two joint venture Agreements were executed containing the nature of the partners' interests in the oil and gas leases and wells (one with a schedule of the specific leases and wells attached), and money was given by Rindlesbacher to Matlock in consideration for the acquisition of an ownership interest in oil and gas leases and wells which Matlock was to develop and operate.

Our exhaustive review of the record reveals evidence presented that on or about December 31, 1981, Matlock offered for sale to Rindlesbacher certain fractional undivided interest in seven oil and gas leases and wells. The checks from Rindlesbacher indicate payment for the

named interest, and the partnership prospectus and both joint venture agreements executed December 22, 1981 and December 31, 1981, respectively, refer to the oil and gas interests both generally and specifically. Rindlesbacher testified that it was his understanding that as a limited partner he was acquiring an interest in specific oil and gas wells and leases on December 22, 1981 when he signed the joint venture agreement, and that Matlock would provide him with the exact description or schedule of the interests at a later date. The evidence shows that Matlock did so. Therefore, the evidence presented was sufficient to prove that the schedule of oil and gas leases included in the joint venture agreements and later provided to Rindlesbacher in April, 1982 were "instruments representing interests in or under oil and gas leases" as defined in the charge given to the jury. Accordingly, Matlock's motion for rehearing is overruled, and/or former opinion stands as supplemented by this opinion.

/s/ LINDA THOMAS
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 90.

84-00030.FR

APPENDIX "C"

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

MERLE LEE MATLOCK,
APPELLANT,

V.

No. 05-84-00030-CR

THE STATE OF TEXAS,
APPELLEE.

ORDER

Appellant's motion for rehearing en banc is OVERRULED and appellant's motion for oral submission is DENIED.

MARCH 5, 1987

/s/ LINDA THOMAS
JUSTICE

APPENDIX "D"

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

MERLE LEE MATLOCK,
APPELLANT,

V.

No. 05-84-00030-CR

THE STATE OF TEXAS,
APPELLEE.

BEFORE CHIEF JUSTICE ENOCH AND JUSTICES HOWELL AND THOMAS

ORDER

The March 20, 1987 second motion for rehearing of appellant Merle Lee Matlock is OVERRULED.

April 1, 1987

/s/ LINDA THOMAS
JUSTICE

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

CRIMINAL BUSINESS

June 29, 1988

RE: Case No. 0535-87 COA#: 05-84-00030-CR
STATE ex rel. Earle, Marle Lee

STATE PENITENTIARY

JUN 29 '88 0 1 5

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: John H. Hagler
2401 InterFirst Plaza
901 Main Street
Dallas, TX 75202

BEST AVAI

ABLE COPY

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

Case No. 0535-87
R: Matlock, Merle Lee

May 25, 1988

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

COA#: 05-84-00030-CR

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

John H. Hagler
2401 InterFirst Plaza
901 Main Street
Dallas, TX 75202

APPENDIX "F"

APPENDIX "G"

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendments to the Constitution of the United States

V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiciton of equal protection of the laws . . .

Statutes of the State of Texas

TEX. REV. CIV. STAT. ANN. art. 3737e (1965)

Sec. 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurence of the act or event or the existence of the condition if the judge finds that:

(a) It was made in the regular course of business;

(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

(c) It was made at or near the time of the act, event or condition or reasonable soon thereafter.

Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record, but shall not affect its admissibility.

TEX. REV. CIV. STAT. ANN. art. 581-29 (C) (1973)

In connection with the sale, offering for sale or delivery of, the purchase, offer to purchase, invitation of offers to purchase, invitations of offers to sell, or dealing in any other manner in any security or securities, whether or not the transaction or security is exempt under Section 5 or 6 of this Act, directly or indirectly (1) engage in any fraud or fraudulent practice, or (2) employ any device, scheme, or artifice to defraud, or (3) knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or (4) engage in any act, practice or course of business which operates or will operate as a fraud or deceit upon any person, is guilty of a felony . . .

Rules of Court

TEX. R. APP. PROC. 74 (o) (1988)

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

APPENDIX "H"

The Indictment

The Appellant was indicted for fraudulently failing to disclose material facts in the sale of securities as prohibited by the Texas Blue Sky law, TEX. REV. CIV. STAT. ANN. art. 581-29 (c) (1973). The indictment alleged, in pertinent part, that the Appellant sold or offered to sell:

> Dale Rindlesbacher, who was acting on behalf of the Enersearch West 1981 Limited Partnership, certain securities, to-wit:
>
> fractional undivided interests in and to each of the following oil and gas leases and wells: the Bishop lease Well #1, located in Montgomery County, Kansas; the Esch lease Wells #16 and #25, located in Elk County, Kansas; the Harlan lease Well #2, located in Young County, Texas; the Chapman lease #2 and the Chapman lease #5, located in Okfuskee County, Oklahoma; and the Shepard lease Well #1, located in Young County, Texas,
>
> and the said MERLE LEE MATLOCK did then and there commit fraud upon the said Dale Rindlesbacher by unlawfully, then and there, intentionally and knowingly, directly and as an agent, failing to disclose that on or about the 6th day of March, 1981, funds invested by investors in the Western Reserves 1980, Western Reserves 1980-A, Western Reserves 1980-B, Western Reserves 1980-III, Western Reserves 1980-IV, and Western Reserves 1980-V Limited Partnerships were commingled into the Explorer Energy bank account, #06-917-9 at the National Bank of Commerce, Dallas, Texas, and a portion of said funds were used to pay quarterly distributions to investors of the Western Pay Zones, Energy Associates 79, and Enersearch Limited 79-B Limited Partnerships, the said information being then and there well known by the said MERLE LEE MATLOCK, and the said MERLE LEE MATLOCK, directly and as an agent,

then and there, intentionally failed to disclose the said information for the purposes of inducing the said Dale Rindlesbacher to purchase said securities, and the said information being a material fact . . . (R.-12-13).